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## THE AMERICAN LEGAL REALISTS AND AN EMPIRICAL SCIENCE OF LAW

By DAVID H. MOSKOWITZ†

### I.

#### SOME PRELIMINARY POINTS

THE CONTRAST between obvious advances in the natural sciences and less impressive successes in other fields has frequently led practitioners in these other fields to attempt to emulate the methods of the natural sciences in the hope that they will thereby be rewarded with comparable achievements.<sup>1</sup> Students of law have not been immune from this temptation and the history of jurisprudence is replete with attempted sciences of law.<sup>2</sup> As a result of nineteenth and twentieth century scientific advances, the attraction became even more appealing, for the theories of the natural sciences appeared to be more akin to the theories employed in law and the accomplishments were even more impressive.

The great achievements of the natural sciences fomented a revolution in the social sciences, and the inductive method was vigorously adopted as the road to scientific progress.<sup>3</sup> The emphasis was on the collection, observation and recording of facts.<sup>4</sup> A pragmatic philosophy

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1. Cf. BERLIN, *HISTORICAL INEVITABILITY* 77 (1954): "In part it is due to a genuine misunderstanding of the philosophical implications of the natural sciences, the great prestige of which has been misappropriated by many a fool and imposter since their earliest triumphs." See also HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 3 (rev. ed. 1955), and Aronson, *Tendencies in American Jurisprudence*, 4 U. TORONTO L.J. 90, 102 (1941).

2. See, in regard to a scientific study of law, Adler, *Legal Certainty*, 31 COLUM. L. REV. 91 (1931); Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925 (1931); Yntema, *Mr. Justice Holmes' View of Legal Science*, 40 YALE L.J. 696 (1931); Yntema, *Legal Science and Reform*, 34 COLUM. L. REV. 207 (1934); Kelsen, *GENERAL THEORY OF LAW AND STATE* xiv, 163-64 (1949); CAIRNS, *THEORY OF LEGAL SCIENCE* (1941); Patterson, *Can Law be Scientific?* 25 ILL. L. REV. 121 (1930); Stoljar, *Logical Status of a Legal Principle*, 20 U. CHI. L. REV. 181, 212 (1953); HALL, *READINGS IN JURISPRUDENCE* 767 (1938); Loevinger, *Jurimetrics — The Next Step Forward*, 33 MINN. L. REV. 455 (1949); Cowan, *The Relation of Law to Experimental Social Science*, 90 U. PA. L. REV. 494 (1948); BEUTEL, *SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF THE SOCIAL SCIENCES* (1957); JONES, *HISTORICAL INTRODUCTION TO THE THEORY OF LAW* 92, 95, 224 (1940). For an attempt to utilize the field theory in the study of legal precedents, see Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 738 (1950).

3. For a discussion of this development in the social sciences, the increased activity in the early twentieth century, see COMMAGER, *THE AMERICAN MIND* 48 (1950).

4. For an extreme view, consider the following: "The natural and physical scientist is now skeptical of 'laws' and confines himself to observing, measuring, and recording what happens in his experiments." III LANCASTER, *MASTERS OF POLITICAL THOUGHT* 17 (1959).

and an instrumental logic were developed to give the new empiricism philosophical respectability. The American legal realist movement was partly a result of, and surely an ally of, the new schools that developed in the social sciences.<sup>5</sup>

Legal study seemed especially in need of new techniques, for the vast social changes of the nineteenth and early twentieth century, coupled with the law's customary lag in dealing with new social problems, emphasized the inadequacy of traditional beliefs. Oliphant has summarized the great social changes that took place in the United States, and to a lesser extent in England:

Following the Civil War in this country, we entered the present period of bewilderingly rapid changes in technology and social organization. To a gigantic industrial revolution in the manufacture of goods have been added a revolution in our whole marketing set up, a revolutionary revamping of our financial and credit structures and an upheaval in the forms of our business organizations.

All this shifting of social forms has operated to create social stresses increasing in variety and magnitude. The passage of our frontier has removed an important outlet for social forces generated by the stress of social change. The combined result has been the present period of mounting pressure calling for an increasing degree of flexibility and adaptability of law and a frank recognition of its pragmatic character.<sup>6</sup>

It will be the burden of this article to discuss some of the proposed remedies for this situation, the creation of empirical sciences of law.

There are, at a minimum, and excluding for the moment some other possibilities, three different meanings attached to the phrase "an empirical science of law." This could mean an empirical study, primarily of a sociological nature, of the effects of law and of different legal rules. It could mean a study of present social conditions in order to aid the creation of law. A third possibility is an empirical explanation or description of judicial behavior.

One preliminary point we should mention is that the philosophical background to this movement, generally the contention that there is little or no difference between facts and theories, is developed in the

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5. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 454 (1930). For the kinship of the experimental economics and the realists, see Frank, *Realism in Jurisprudence*, 7 AM. L.S. REV. 1057 (1934).

6. Oliphant, *The Public and the Law — The Three Major Criticisms of the Law and Their Validity*, 19 A.B.A.J. 46, 48 (1933). See also FRIEDMANN, *LEGAL THEORY* 245 (1960).

writings of Cook and Oliphant.<sup>7</sup> While an understanding of this intellectual background is necessary for an appreciation of the historical development of the striving for an empirical science of law, a discussion of the merits of the actual proposals is possible without wandering into the philosophical quagmire that nurtured them.

One further preliminary point that must be emphasized is that the realists' conception of an empirical science of law is not a single doctrine that can be discussed as one single theory, but is a set of theories, and a true understanding of these theories will come only with an isolation and discussion of them separately. To discuss them as though they are one theory, which is what Professor Kantorowicz does,<sup>8</sup> results in some of the criticisms not being applicable to some of the theories, and creates a false picture of unanimity and agreement.

The complexity of the task is heightened by the fact that each theory is not a single unit, but each, to a greater or less degree, builds upon the others, and there is sometimes an appearance of agreement, even though there is often a rejection of some, if not all, of the other theories. Even more confusion results from the adaptability of some of the theories to multiple interpretations. The possibility of contrary interpretations to the one adopted herein will be discussed whenever the problem presents itself. Further confusion is created by the fact that some men have proposed several different theories; for example, Llewellyn's theories can be placed in three of our five categories.

We suggest that the exposition will be clearest if we discuss the theories of five writers individually. By doing this, the inconsistencies within each theory, plus the possible varying interpretations, can be indicated. We also hope to show that the theories blend into each other, and therefore, seem to form one complete theory. The gradation presented is not that of a straight line, but rather a circle, so that the last theorist appears to have more in common with the first theorist than possibly with the fourth one. After a discussion of each of the theorists, a summation illustrating their similarities and agreements, as well as their disagreements and dissimilarities, will be attempted, and then we will criticize them individually.

There are some points which are common to all of the theories sketched below, and we would like to present these first. All the theorists, except probably Frank, accept the prediction theory of law as their basic theme for devising a science of law. All of them are in-

7. See the following articles by Cook, *The Possibilities of Social Study as a Science*, *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* 27 (1931); "Facts" and "Statements of Fact," 4 *U. CHI. L. REV.* 233 (1937); *MY PHILOSOPHY OF LAW* 51 (1941); and, especially, *Scientific Method and the Law*, 13 *A.B.A.J.* 303 (1927). See also Oliphant, *Facts, Opinions, and Value-Judgments*, 10 *TEXAS L. REV.* 127 (1932).

8. See Kantorowicz, *Some Rationalism About Realism*, 43 *YALE L.J.* 1240 (1934).

terested in devising a science of law that will enable lawyers to make more accurate predictions, so all of them have the point of view of the counsellor primarily in mind. While there is agreement about what they are attempting to do, their approaches to the problem and the resultant theories are quite different.

All five theorists are concerned with the development of an empirical science of law. While, as will appear below, it is not fair to say of all of them that they believe "legal science is not a rational but an empirical science,"<sup>9</sup> for some of them are building an empirical science in conjunction with an accepted rational (or analytical) science, it cannot be controverted that the emphasis for all of these theorists is on fact-collection, and that all of them accept the model of scientific procedure to be that of observation, fact-collection, generalization, and checking the generalization against the facts. All would probably accept the implications though not necessarily all the particulars of Llewellyn's following statement about their primary interests concerning the study of law:

They (the realists) want law to deal, they themselves want to deal, with things, with people, with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles — not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles. They want to check ideas, and rules, and formulas by facts, to keep them close to facts.<sup>10</sup>

This aspect of realism has been much criticized, for example, by Kantorowicz,<sup>11</sup> Pound,<sup>12</sup> Fuller,<sup>13</sup> Kennedy,<sup>14</sup> and the criticisms are valid and effective, for similar statements are noticeably absent in the later realistic writings.

Our legal concepts, like all concepts, are never observable; there is no such thing as a "plaintiff" without a legal system, or even a "judge." As Kantorowicz has demonstrated,<sup>15</sup> the difficulty is that the realists have confused realities and the legal meaning of these realities. The legal effect of an act, its legal significance, is never

9. *Ibid.*

10. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222-23 (1931). (Emphasis in original.)

11. Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1249 (1934).

12. Pound, *A Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 700 (1931).

13. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 447 (1934).

14. Kennedy, *Principles or Facts?* 4 FORDHAM L. REV. 53, 59-60 (1935); *Functional Nonsense and the Transcendental Approach*, 5 FORDHAM L. REV. 273, 289 (1936); *A Review of Legal Realism*, 9 FORDHAM L. REV. 362, 371 (1940).

15. See Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1249 (1934).

observable, and it is this with which the lawyer is concerned. Furthermore, legal terminology is replete with words which have no observable referents, and the limitation of inquiry to words with solely observable referents would strip legal discourse of much of its meaning.<sup>16</sup> All items of legal significance are not concrete or tangible, and to propose a study of law, restricting that study to tangible and concrete objects, is to eliminate the "law" itself from the study. It is of interest that Bentham also called for a legal science based on observation, but he planned to observe both the acts and thoughts of men.<sup>17</sup>

A second preliminary point we wish to consider is Llewellyn's statement that a separation between the "is" and the "ought" will be necessary in order to achieve an empirical science of law. Unlike the prior point, however, while this has also provoked much criticism, the criticism has been largely unjustified. The relevant paragraph, from the same article by Llewellyn quoted above, is as follows:

. . . the temporary divorce of Is and Ought for purposes of study. By this I mean that whereas value judgments must always be appealed to in order to set objectives for inquiry, yet during the inquiry itself into what Is, the observation, the description, and the establishment of relations between the things described are to remain *as largely as possible* uncontaminated by the desires of the observer or by what he wishes might be or thinks ought (ethically) to be. More particularly, this involves during the study of what courts are doing the effort to disregard the question what they ought to do. Such divorce of Is and Ought is, of course, not conceived as permanent. To men who begin with a suspicion that change is needed, a permanent divorce would be impossible. The argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is not doing. And realists believe that experience shows the intrusion of Ought-spectacles *during the investigation of the facts* to make it very difficult to see what is being done. On the Ought side this means an insistence on informed evaluations instead of armchair speculations.<sup>18</sup>

Almost all of the statements by realists of this separation that we have encountered have been equally moderate,<sup>19</sup> yet this separation has been criticized as follows:

16. See Kennedy, *A Review of Legal Realism*, 9 FORDHAM L. REV. 362-63 (1940).

17. For a discussion of this, see JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW 92 (1940).

18. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1236-37 (1931). (Emphasis in original.)

19. Llewellyn elsewhere has made the following statement:

I do not deny that ideals are valuable, and that some arbitrary value judgments are indispensable, *to set a problem for inquiry*, nor do I deny that in good part

*First*, the realists have assumed that a rigorous separation of *is* and *ought* is possible, and that one may study the law in isolation from its ethical context. *Secondly*, they have assumed that the separation of *is* and *ought* is something so obviously desirable that it is not necessary to justify the expenditure of human energy needed to achieve it. *Thirdly* — and here we must depend to a greater degree on inference — they have apparently assumed that nothing worthwhile can be said about the *ought* until after the *is* has been scientifically and exhaustively chartered. These assumptions are, in my opinion, false, and to the extent that they have been taken seriously their effects on American legal thinking have been injurious.<sup>20</sup>

That this criticism is unjustified is obvious as a comparison of the language of Llewellyn quoted above with what the realists are supposed to have assumed will show. Moreover, the realist movement from its inception has had strong reformist tendencies, and the realists have advocated many legal changes. It is clear that the realists suggested that the “*is*” and the “*ought*” be separated for observational purposes only, and it is difficult to imagine an empirical science which does not accept this distinction. Professor Fuller charges realism with the abnegation of values in legal study, but his criticism is unwarranted.

It will be easier to follow the discussion if we indicate, in very broad terms, the gradation of theories that will be presented. The

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the setting of the problem determines the observation. I do say that, *once the problem is set*, every effort must be bent on keeping observation uncontaminated by other value judgments than the desirability of finding out, of being objective and accurate, and of so recording as to invite the cross-checking of other observers. Llewellyn, *Legal Tradition and Social Science Method*, ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES 89, 99 n.6 (1931). Felix Cohen has made a similar statement: “Intellectual clarity requires that we carefully distinguish between the two problems of (1) objective description, and (2) critical judgment, which classical jurisprudence lumps under the same phrase.” Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 841 (1935). Consider also Frank’s statement:

Dissatisfied with the avoidable uncertainties, injustices and inefficiencies disclosed by their observation of the workings of the courts, and wishing — within the limits of possibility — to change those workings to conform to their ideals, they sought to avoid confusion between “what is” and “what ought” to be. But always their primary aim was in the realm of the practicable “ought to be” — attainable ideals. FRANK, IF MEN WERE ANGELS 57 (1942).

20. FULLER, THE LAW IN QUEST OF ITSELF 60–61 (1940) (emphasis in original). See McDougal’s defense of the realists, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834–35 (1941), and see Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 808 (1961). See also STONE, *The Province and Function of Law* 144, 382. Note also the following comment by Fuller which should be compared to the one quoted above:

Before leaving this subject it might be well to point out that it is not always easy to distinguish between the process of discovering the facts of social life (descriptive science), and the process of establishing rules for the government of society (normative science). Much of what appears to be strictly juristic and normative is in fact an expression, not of a rule for the conduct of human beings, but of an opinion concerning the structure of society. Before one can intelligently determine what *should* be, one must determine what *is*, and in practice the two processes are often inseparably fused.

Fuller, *Legal Fictions*, 25 ILL. L. REV. 877, 906 (1931).

theories of Frank, Oliphant, Moore, Llewellyn, and Bingham will be discussed in that order. Frank, Oliphant, and Moore are all concerned with the reasons for judicial decisions. We call these the explanatory theories. Llewellyn and Bingham form the second group, and they are not concerned with explaining why the decisions were reached, but are interested in describing the decisions in empirical generalizations. Consequently, we call these two theories the descriptive theories. We will now consider the two groups of theories, and criticism will be delayed until all have been presented.

## II.

### THE EXPLANATORY THEORIES

It is somewhat unfair to Frank to treat him as though he attempted to create a science of law, for he expressly and consistently denied the possibility of such a science.<sup>21</sup> He proposed the inculcation of the scientific spirit in law rather than attempting to employ the scientific method.<sup>22</sup> Our justification for including Frank in this discussion is that an incorporation of his theory in our classification is instructive. We will paraphrase Frank's argument, for our purpose is solely to present it.<sup>23</sup>

The lawyer's job is to predict future court decisions in particular cases. In order to make an accurate prediction, the lawyer wants to know exactly what induces a court to decide any particular concrete case one way rather than another. Some familiarity with the relevant rules and principles will aid the lawyer in this prediction, but, even if the lawyer knows the pertinent rules and principles, he cannot predict the outcome of a particular case.

Rules and principles are of less value in predicting the judge's decision than is commonly supposed because the judge often arrives at his decision with little or no prior attention to the legal rules. The judge decides on his result, and then, in the opinion, he justifies his result in terms of the legal rules. But the judge's opinion does not disclose the factors which induced him to decide the case that way.

The judge arrives at his decision by means of a "hunch" of what a desirable result would be. The important problem for the lawyer is to determine what produces the judge's hunches. The legal rules

21. See FRANK, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 761, 773, 778 (1932); *IF MEN WERE ANGELS* 294 (1942); *LAW AND THE MODERN MIND* xxiii (1949).

22. See FRANK, *LAW AND THE MODERN MIND* 98 (1949); *The Lawyer's Role in Modern Society: A Round Table*, 4 J. PUB. L. 1, 8, 23 (1955); *COURTS ON TRIAL* 219 (1949).

23. Most of this discussion is based on Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 761 (1932).



are of some influence, but the judicial hunch cannot be described solely in terms of the rules and principles.

What Frank wants to know are the reasons why a judge decided one way or the other, and his disappointment with the judge's opinion and its reliance on the legal rules is based on its not disclosing the "real reasons" for the decision:

But for all its suggested value, it may well be that our official jargon cramps not only the style but the thinking of judges. The distorting or deforming of their 'real reasons,' which results from the obligation to shove and compress them into rule-language, may easily restrict keen searching into the validity of those 'real reasons.'<sup>24</sup>

Frank suggests the type of "rules" the lawyers would like to have:

The rules that lawyers would like to (but do not) have are rules which would aid them in precisely predicting specific decisions in contested cases and in bringing about such specific decisions. . . . It is true that practicing lawyers learn to know something about the idiosyncrasies of particular judges before whom they frequently appear. . . . Knowledge of that sort might be called 'rules for decision' by Judge Brown, Green, Blue, Yellow, or Purple. It is conceivable that such data could be more skillfully organized, worked out in greater detail.<sup>25</sup>

Two judges may employ, or at least express employment, of identical rules, but this does not mean that the "real reasons" for the decisions were the same;<sup>26</sup> conversely, they may express different rules, but have the same "real reasons."<sup>27</sup>

Frank concludes that a science of these "real reasons" is impossible.<sup>28</sup> This does not affect our description of what he thought such a science would be. The important point to note is that his theory does not necessarily involve any variation in the traditional notion of what legal rules are; they may still be adhered to by judges. He questions their effect in controlling judges, but admits they may be of some influence. He wants to know what other factors influence the judge, and he wants to accumulate this knowledge in order to be

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24. *Id.* at 765.

25. *Id.* at 775.

26. Frank, *Are Judges Human?* 80 U. PA. L. REV. 17, 37 (1931).

27. *Id.* at 38.

28. 'It will, too, I suspect, reconcile us to the fact (a) that specific decisions must often be unpredictable, (b) that efforts to make most specific decisions markedly more predictable are largely futile, (c) that such efforts can only result in obscuring the real nature of the judging process and prevent it from being understood and/or improved. We shall almost surely conclude that if the word science is taken to mean something remotely resembling an exact discipline, then anything like a legal science is an impossibility.'

Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 761, 778 (1932).

able to predict judicial decisions. In short, he wants to know the "real reasons" explaining judicial behavior.

Unlike Frank, Oliphant clearly calls for the creation of an empirical science of law. But his starting point is the same as Frank's: doubt whether the legal rules truly control the judge's decision. Oliphant espouses a theory that the judge's opinion is a rationalization, and presents a belief of the logical indeterminacy of a single precedent.<sup>29</sup> At this point, we wish to outline Oliphant's "stimulus-response" theory so that the reader can fit it into the classification we are presenting.<sup>30</sup>

The "stimulus-response" theory is, briefly, the doctrine that the judge's decision is a response to the stimulus of the factual situation of the case before him. The response is the decision, and the dominant stimulus is the facts of the case, found by an examination of the record. It is obvious that Oliphant is referring to appellate courts.

Failure to recognize that this is the way judges decide cases is the reason for the poor state of legal scholarship:

Why has not our study of cases in the past yielded to results now sought? The attempt has been made to show that this is largely due to the fact that we have focused our attention too largely on the *vocal behavior* of judges in deciding cases. A study with more stress on their *non-vocal behavior*, i.e., what the judges actually do when stimulated by the facts of the case before them, is the approach indispensable to exploiting scientifically the wealth of material in the cases.<sup>31</sup>

However, Oliphant's suggested improvements relate both to the study of judicial decisions and to the analysis of legal concepts. As to the former, note the following:

But there is a constant factor in the cases which is susceptible of sound and satisfying study. The predictable element in it all is what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions, but which way they decide cases will be the dominant subject matter of any truly scientific study of law.<sup>32</sup>

The latter point is that the analysis of judicial decisions has departed from the search for the exact holdings of the cases and has been largely

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29. See Oliphant and Hewitt, *Introduction to RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES* (1929).

30. This theory is propounded in Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928).

31. *Id.* at 161 (Oliphant's italics). See also Oliphant and Hewitt, *Introduction to RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES* xxvii (1929).

32. Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928).

concerned with the formation of broad generalizations. Oliphant implies that these generalizations are of small aid to the judges in deciding cases.<sup>33</sup>

While Oliphant's behavioristic terminology would lead one to believe that he is ignoring the volitional element in the judicial decision, ignoring the judge's thinking about the problem, and merely calling for an external study of the decision-making process, we suggest that this interpretation is incorrect. What Oliphant is trying to do is to find the one stimulus of the many stimuli that are present when the judge makes his decision that lends itself most readily to a study of the type he is proposing. The natural choice is the stimulus that he believes is predominant in the judge's decision. But he is not ignoring the possibility of other stimuli. If he thought that the legal classifications and the legal rules were of no effect on the judge, how can one explain his concern to create more useful generalizations?

According to Oliphant, the predominant influence on the judge is his desire to reach a satisfactory decision. The reason for the decision will be the desirability of the decision as a solution to the problem presented by the factual situation in the case before the judge. This reason is called a stimulus because the judge may not always arrive at his decision by the route of weighing the desirability of various results, but he may intuitively sense which result is desirable. But this reason is not a stimulus in the behavioristic sense of automatic or conditioned. The judge consciously seeks a desirable result, but his realization of what the desirable result will be may be intuitive, and it is this which leads Oliphant to call a stimulus what we suggest should be termed a justification.

The point we wish to emphasize is that Oliphant is urging a change in the method of study of the law in order to bring it closer

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33. . . . [T]here would be no conflicts among the cases if they were not grouped at all under any generalizations. This suggests the possibility that, as to many of the exceptions and conflicts of which we complain, the difficulty may be with parts of our classification and not with the results actually reached by the courts. That classification being based on abstractions which changes in life have made obsolete, it would not be surprising if we should find that judges, responding to the needs of current life, had frequently departed from the confines of that classification though still stating and justifying their results in terms of it.

We have been drifting from observation of judicial action to an excess of concern about judicial utterances. More and more we have been taking abstractions of the past, — many going back to medieval scholasticism — and tracing them down, not through the holdings of the cases, but through the opinions to see how they have fared in those essays of rationalization. There has been little but lip service to the discipline of seeking the exact holdings of cases, as opposed to their generalized pronouncements, except when the cases happen to lie near the rim of some favorite theory whose precise border we want to mark out. There has been little genuine re-examination of the holdings of those cases which lie at the center of that theory in order to test the utility of the whole generalization. *Id.* at 76, 107. See also Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law*, 28 COLUM. L. REV. 997, 1013 n.36 (1928).

to what the judges are actually doing. He does seem also to assert that judges should be trained to decide cases in this manner,<sup>34</sup> but the following passages indicate that he believes that judges do decide cases primarily in response to the stimulus of the facts:

But what has this general retreat in legal thinking toward super-generalized and outworn abstractions meant for the doctrine of *stare decisis*? It is just this retreat which I characterize as the shift from *stare decisis* towards *stare dictis*. Not that courts have ceased to be motivated dominantly by an intuition born of their experience and to respond to the stimulus of the facts in the concrete cases before them rather than to the stimulus of over-general and outworn abstractions in opinions and treatises. It is something to know that judges will continue to be men and that we shall always have some measure of that safeguard. But the effects of this shift, both on the art of judicial government and on legal science, are profound and unfortunate.<sup>35</sup>

From this viewpoint we see that courts are dominantly coerced, not by the essays of their predecessors but by a surer thing, — by an intuition of fitness of solution to problem, — and a renewed confidence in judicial government is engendered. To state the matter more concretely, the decision of a particular case by a thoughtful scholar is to be preferred to that by a poorly trained judge, but the decision of such a judge in a particular case is infinitely to be preferred to a decision of it preordained by some broad 'principle' laid down by the scholar when this and a host of other concrete cases had never even occurred to him.<sup>36</sup>

It is true that Oliphant is advocating changes in our manner of study of the judicial decisions, but the relevant point is that the error of the present mode of study results from its misconception of the judicial process, and the correction of this error involves the realization of how judges decide cases.

We plan to discuss, at considerable length, the attempt of Underhill Moore, and varying associates, to create an empirical science of law. We will present Moore's theory in considerable detail because his lengthy study lends itself to several interpretations. He created some misunderstanding by his use of an unfamiliar terminology and by his strained writing style. Moore conducted two extensive studies, and it is our contention that only the second one was truly behavioristic.

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34. Cf. Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159, 161 (1928). Cf., also, Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEXAS L. REV. 127, 138-39 (1932).

35. Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 75 (1928). However, see PATTERSON, *JURISPRUDENCE* 314 (1953).

36. Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928).

We will not discuss the second, the study of parking in New Haven,<sup>37</sup> but we will concentrate on the first, the study of the banker's right to discount matured notes against the depositor's checking account.<sup>38</sup> We are disregarding the second study because it is not concerned with the effect of legal rules on judicial decisions but is concerned with the effect of legal rules in controlling the behavior of the public.

We plan to demonstrate that Moore is primarily interested in devising a means of greater prediction for the practicing lawyer, that the method he selects is chosen because Moore expects that greater predictability will be thereby achieved, that Moore rejects the legal rules and their logical application because he believes that their value for the purpose of predictability is too limited, and that, therefore, for the lawyer to be able to predict, he will have to forsake the traditional rule-decision procedure of legal study and accept, as one possibility, Moore's institutional approach. In short, Moore's position is that, while he recognizes that legal rules are of a normative nature in regard to judges, he denies that knowledge of legal rules will enable lawyers successfully to predict judicial decisions.

It is possible to interpret Moore's thesis as an attempt to find a correlation between some external factor and the judge's decision, without considering what the judge does at all, but solely deriving a statistical correlation that will enable prediction even though it is not explanatory of the decision process. It is also possible to interpret Moore as presenting a proposal about how judges ought to decide cases, what factors they should consider important and relevant to their decision. While these interpretations are plausible, it is our contention that Moore is explaining how judges do reach their decisions.

Like Frank and Oliphant, Moore begins by asking how predictions of court decisions can be made more accurate. He is concerned only with the viewpoint of the legal practitioner.<sup>39</sup> He is not interested in all the tasks of the practitioner; for example, he is not concerned with counselling techniques or the prevention of litigation. He is solely concerned with the method by which practitioners predict judicial decisions.<sup>40</sup>

It is Moore's contention that the theory the lawyer uses is that a study of past cases and the facts that resulted in these decisions will

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37. MOORE & CALLAHAN, *LAW AND LEARNING THEORY: A STUDY IN LEGAL CONTROL* (1943).

38. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 381, 555, 752, 928, 1055, 1219 (1931).

39. Cf. Moore & Sussman, *The Lawyer's Law*, 41 YALE L.J. 566 (1932).

40. *Id.* at 571.

enable him to predict the decisions in future cases.<sup>41</sup> However, while this is the theory, the actual practice of the lawyer is quite different. The lawyer's forecast is in reality an intuitive judgment:

In a case of any novelty whatever, the lawyer in predicting judicial behavior is compelled to rely not on logical application of those laws but on an intuitional judgment based on an experience only a small part of which is those laws.<sup>42</sup>

The lawyer's difficulties in successful prediction are a result of his non-recognition of this intuitive factor and his continued concentration upon the traditional legal materials which he uses to explain his forecast:

However, to the lawyer's rational account can be attributed his failure to recognize that his judgments are intuitional and given in inclusive situations of many biological and cultural factors, his failure to attempt an analysis of the process of his judgments and his failure even to begin systematically to take into account the factors in the situations.<sup>43</sup>

The situation, therefore, is as follows. The lawyer thinks that there is a causal relationship (in the popular sense of the word "causal") between his "laws" and the resultant decisions, and that his "laws" are summaries of past decisions:

The sequences which are derived from a large group of very similar cases the lawyer has incorporated in propositions in which he ascribes a causal relation between the behavior of the parties and the decision of the court.<sup>44</sup>

Among all the variables present in his situations, the lawyer has chosen the behavior of the parties with which to equate the behavior of the courts. . . . Consequently the primary statements of the lawyer's literature are written in the form of sequences of behavior. After the parties behave in this manner the court behaves in that manner.<sup>45</sup>

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41. The central problem of the lawyer is the prediction of judicial and administrative decisions. For its solution he has looked to the cases recording the decisions of the past, and has made no systematic study of other data. In adopting this course, he has postulated that study of the relation between the decisions and the "facts" of recorded cases would be sufficient to enable him to formulate laws, from which he could predict future judicial and administrative behavior. Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703 (1929).

42. *Id.* at 703. See also Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 752 (1931).

43. Moore & Sussman, *The Lawyer's Law*, 41 YALE L.J. 566, 570 (1932). Note also *Id.* at 568-69.

44. *Id.* at 568.

45. *Id.* at 567-68.

The lawyer's misconception is nourished by the judges appearing to decide cases by considering these laws and the facts before them:

His persistent pursuit of his laws in the 'facts of the case' may be explained by the fact that the judges and administrators themselves in their opinions begin quite irrelevantly and ambiguously to say that their behavior was the necessary consequence of these laws. From necessary logical deduction to necessary behavior was an easy step, and the transformation of scientific generalizations into Law was complete.<sup>46</sup>

What the lawyer has failed to see is that his laws are not always the reasons for the courts' decisions.

Moore admits that the lawyer may be able to predict with a high degree of accuracy in those instances where there are recent precedents with similar facts.<sup>47</sup> However, frequently there will be no precedents with similar factual situations:

But in many instances, among the lawyer's cases, the situation in which the selected events are identical with or, according to some relevant standard, similar to the selected events in the situation in hand and in which the critical event is judicial behavior are so few in number that observation of the frequency of the concurrence of each form of the critical event in those situations will not indicate a useful probability of the form which the critical event will take in the situation in hand. These are the usual instances in which the case before the lawyer is not foreclosed by a number of recent cases from his own jurisdiction.<sup>48</sup>

While Moore does not explicitly say so, the implication is that the judges in deciding the cases must look to other factors beside the precedents, for there usually will be no precedents with sufficiently similar facts to guide them.

For the lawyer, the problem is to choose, from the many variables that may enter into the judge's decision process, the factor which will lead to greatest predictability.<sup>49</sup> From all the possible factors, Moore selects the institutional behavior of the society for study:

There are innumerable other facts with which official behavior might be correlated. . . . It is proposed that the field of the lawyer's attention be extended to include not only the relation between judicial behavior and 'the facts of the case,' but also the

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46. Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703-04 (1929).

47. Moore & Sussman, *The Lawyer's Law*, 41 YALE L.J. 566, 572 (1932).

48. *Id.* at 572-73.

49. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 555, 560 (1931).

relation between judicial behavior and institutional (frequent, repeated, usual) ways of behaving (*e.g.*, doing business) in the contemporary culture of the place where the facts happened and the decision was made. If such a relation is found to be significant, a step towards more reliable predictions will have been made.<sup>50</sup>

Institutional behavior is the habitual behavior of the members of the society, "behavior which frequently, repeatedly, usually occurs."<sup>51</sup> Moore proposes a study of the deviation from the institutional behavior, of the behavior comprising the facts of the case, for he suggests that the decision will be a reflection of the amount of deviation. In other words, he suggests that the behavior that forms the factual situation giving rise to a lawsuit must to some degree be at variance with the usual behavior in the society, and the key to understanding the decision based on these facts lies in examining the degree of variance between the usual behavior, the institutional behavior, and the behavior that eventually comes to be regarded as the facts of the lawsuit in question. Knowledge of the difference, more accurately the knowledge of the amount of difference, between the behavior of the litigants and the usual behavior in the society will enable the lawyer to predict the outcome of a lawsuit based on the behavior of the litigants.

The method that Moore utilizes to determine the degree of deviation is as follows:

That method provides, first, a procedure for analysis of behavior (institutional and non-institutional) into transactions. Secondly, it provides for the determination of what transactions are sequential (institutional). Thirdly, it provides a procedure for the choice of the sequence with which each of the transactions is to be compared in finding the type and degree of its deviation. Fourthly, it provides a gauge for measuring the degree of deviation.<sup>52</sup>

Finally, this deviation is to be used to predict the decision of the court:

By the application of the proposed methods of comparison and measurement to 'the facts' of a decided case, the correlation between the decision and the measured degree of deviation between 'the facts' and the institution can be stated. After the method has been applied to large numbers of cases in many fields it may be possible to state 'laws' for some fields in terms of that correla-

50. Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 704-05 (1929).

51. *Id.* at 707. See also Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 610, 610-11 (1923) and Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 555, 563-64 (1931). For further elucidation of "institution," see Hamilton, "Institution," 8 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 84 (1937).

52. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 555, 564 (1931).



tion. Since the institution, if any, may be objectively determined and the degree of deviation between it and the particular transaction-series may be measured approximately, if such 'laws' can be stated, their utility in prediction is apparent.<sup>53</sup>

Moore made several applications of this method, one of which we will discuss.<sup>54</sup>

Moore applied this technique to the analysis of three cases with very similar facts, all dealing with the same problem. The question was whether a bank must continue to honor its customer's checks when he has discounted and credited to his account a time note on which the date of maturity has arrived. If the time note is deducted from his account, he has no more money on deposit. The three cases are *Callahan v. Bank of Anderson*,<sup>55</sup> *Delano v. Equitable Trust Co.*,<sup>56</sup> and *Goldstein v. Jefferson Title & Trust Co.*<sup>57</sup> In the first case, a South Carolina court held the customer could recover, but, in the other two cases, New York and Pennsylvania courts held that the bank was not liable for refusing to honor the customer's checks.

Moore conducted extensive field studies in order to determine the institutional behavior relevant to this problem in each of the three jurisdictions. Moore concluded that the results of these studies indicated that the deviation from institutional behavior was greater in South Carolina than in New York and Pennsylvania. The crucial point for our purposes is the relationship between this deviation and the court's decision. If this relationship is a statistical concurrence, and is not concerned with the process by which the court reached its decision (Moore is stating that he has noted a high correlation between these factors and, therefore, one can predict the decision by knowing the deviation), then Moore would be conducting a study of the type we have placed in the descriptive group, for this correlation would not explain how the judges reached their decisions. However, if Moore is contending that there is a high correlation between the deviation and the court's decision, and that this deviation must be a factor in the court's decision, that is, the court considers it in deciding the case, then Moore properly belongs in our first group. The remainder of the discussion of Moore will be an attempt to prove that the latter of the two interpretations is the more justifiable one.

53. Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 719 (1929).

54. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 381, 555, 752, 928, 1055, 1219 (1931).

55. 69 S.C. 374, 48 S.E. 293 (1904) (lower court decision affirmed because Supreme Court was evenly divided).

56. 110 Misc. 704, 181 N.Y. Supp. 852 (Sup. Ct. 1920).

57. 95 Pa. Super. 167 (1928).

Moore does not expressly disclose his view of how courts decide cases. The closest he comes to expressing himself on this point is in a confusing passage in which he seems to imply that his study is not concerned with whether courts follow previous decisions:

The study of which this series is an account was undertaken, it is true, because it was doubted that legal method, the manipulation of legal abstractions and propositions of 'law' found in opinions and briefs, is a device for observing and stating the causal relation between past and future decisions and because it was doubted that, in some fields, there is a direct relation between them which is significant for forecasting. That these doubts are reasonable has been argued; but the study has not attempted the ambitious project of establishing the negatives which the doubts imply. Nor is there need that it should.<sup>58</sup>

However, Moore does elsewhere seemingly equate the judge's decision process with the decision process of a discipline committee of a club or an admission committee of a law school.<sup>59</sup>

The crucial point, however, is that Moore's explanations of the three decisions indicate that the reasons for the decisions are the degrees of deviation of the behavior of the litigants from the institutional behavior in the society. The courts, in short, are using his deviational standard to decide cases:

A plausible explanation of the judgment for the customer in South Carolina is that the court took as its standard of decision (or was indirectly conditioned by) the institutional comparables for each of the two transactions of the *Callahan* case. The first, viewed as a device, grossly deviated from the standard device and was, therefore, not accorded by the court a legal consequence conforming to the institutional consequence which would have followed had the standard device been used. The second transaction, viewed as a consequence of the first, slightly deviated from the standard consequence of the institutional device from which the first transaction deviated grossly, and was therefore rejected as the legal consequence of the first. Instead the institutional consequence which would have followed had the deviational device not been used was chosen as the legal consequence. Similarly, in giving judgment for the bank in the *Delano* and *Goldstein* cases, the court took as its standard the institution. In both, the first transaction, viewed as a device, slightly deviated from the standard device, and was, therefore, accorded a legal consequence conform-

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58. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 1219 (1931).

59. Moore & Sussman, *The Lawyer's Law*, 41 YALE L.J. 566, 571 (1932).

ing to the institutional consequence which would have followed had the standard device been used. The second transaction, viewed as a consequence of the first, slightly deviated from the standard consequence of the institutional device from which the first transaction deviated slightly, and was therefore accepted as the legal consequence of the first. The institutional consequence which would have followed had the device not deviated at all was chosen as a legal consequence.<sup>60</sup>

Furthermore, Moore seems to state that courts should decide cases according to their notion of what is just, reasonable, and fair, and that their notion of what is just, reasonable, and fair will be based on the standard of the degree of deviation:

The hypothesis which does underlie this study is that the institutions of a locality are among the cultural factors in a litigation-situation significantly connected with the decision and that the semblance of a causal relation between future and past decisions is the result of the relation of both to a third variable, the relevant institutions in the locality of the court. It is probable that the notion of a court as to the just, reasonable, fair, and convenient way for customer and bank to behave and also the just, reasonable, fair and convenient consequence which the court should attempt to attach to the way the parties did behave is related to more frequent and therefore regular behavior in such situations in the locality.<sup>61</sup>

How did the court learn of the institutional behavior in order to gauge the degree of deviation? Moore's highly unsatisfactory answer to this question, and the weakest part of his entire thesis, is as follows:

Though overt behavior which is frequent and regular may not have directly impinged, frequently or at all, upon the court, yet verbal symbols which do reflect that overt behavior, even though obscurely, or other behavior closely connected with it, have impinged upon the court.<sup>62</sup>

This extended argument has attempted to establish that Moore's theory involves the prediction of judicial decisions by employing the same technique that, impliedly, the courts use in reaching these decisions. We will now consider the second group of theories, the descriptive theories.

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60. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 1219, 1250 (1931). For Moore's explanations of each of the decisions, see *Id.* at 1235, 1242-43, and 1249.

61. *Id.* at 1219.

62. Moore, Sussman & Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks*, 42 YALE L.J. 817, 1198-99 (1933).

## III.

## THE DESCRIPTIVE THEORIES

This section will contain a discussion of Llewellyn's proposal for an empirical science of law. Discussions of Llewellyn sometimes disregard the fact that he made several different proposals, but, for present purposes, only one of them is relevant. Llewellyn has defined "law" as "what officials do about disputes."<sup>63</sup> While not expressly a reference to an empirical science of law, it can be considered as such, but, if so treated, it belongs in our last category with Professors Bingham and Cook if it is interpreted as a denial of the normative nature of legal rules. Professor Llewellyn also developed a theory of "working rules" as distinguished from "paper rules." While this is not our immediate concern, it deserves mention, for it is our contention that this is something different from his theory of "real rules," and it is the confusion of one with the other that has created some misunderstanding. The confusion results from Llewellyn using, in the same article,<sup>64</sup> the term "working rules" to distinguish one type of rules from "paper rules," and then using the term "real rules" as distinct from "paper rules." While "paper rules" means the same thing in both contexts, "real rules" are not the same as "working rules."

Llewellyn states that the word "rule" can be used to mean two different things: it may be a rule for doing something, an "ought," a normative statement, or a rule of doing something, an "observed regularity."<sup>65</sup> "Paper rules" are ought-rules, rules for doing things, normative statements. This is what Llewellyn means when he defines a "paper rule" as "a rule to which no counterpart in practice is ascribed."<sup>66</sup> A "working rule," according to Llewellyn, "indicates a rule with counterpart in practice, or else a practice *consciously* normatized."<sup>67</sup> "Rule" in both of these definitions is prescriptive. A "paper rule" is the traditional rule of law, and a "working rule" is a rule that has been followed, or an "ought" that has been recognized as such and has guided or been the reason for judicial conduct.

It is generally assumed that the "paper rule" is always a "working rule," that judges always follow the "paper rules," and that the "paper

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63. See LLEWELLYN, *THE BRAMBLE BUSH* 12 (1951).

64. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431 (1930).

65. *Id.* at 439. See also Llewellyn, *Legal Tradition and Social Science Method — A Realist's Critique*, *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* 89, 98-99 (1931).

66. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 439 n.9 (1930).

67. *Ibid.*

rules" control the judge's behavior.<sup>68</sup> Llewellyn is questioning this general assumption, and he is proposing a study to determine the rules which the judges actually follow. The similarity between this approach and the theories of the explanatory group is apparent. While they start with the assumption that the rules are not always followed by the judges in the sense of being the determining factor in all decisions, and attempt to find a factor which is employed by the judges, and which will permit prediction of judicial decisions, Llewellyn sets out to discover which rules are followed. He is going to class those rules which are followed, those rules which to the judge are "consciously normative," as "working rules." This theory can be included with the three similar ones in the explanatory group.

Llewellyn, however, offers us another type of rule to distinguish from "paper rules." "Paper rules" are still the same prescriptive rules which the judge may or may not follow. To be distinguished from "paper rules" are "real rules." But "real rules" are not "paper rules" that the judge has followed. "Real rules" are descriptive terms, not really "rules" at all in the sense "rules" is used in the definition of "paper rules." The "rules" in "real rules" means the descriptive sense of "rules," not the prescriptive sense. This should be evident from a reading of Llewellyn's definition of "real rules":

'Real rules' are conceived in terms of behavior; they are but other names, convenient shorthand symbols, for the remedies, the actions of the courts. They are descriptive, not prescriptive, . . . 'Real rules,' then, if I had my way with words, would by legal scientists be called the practices of the courts, and not 'rules' at all. . . . 'Paper rules' are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place — what the books there say 'the law' is.<sup>69</sup>

"Real rules" express the behavior of the courts; they are what the courts do.

In sum, "real rules" are factual terms that describe the activities of courts. The implication from this is that there can be a study of the "paper rules," the traditional prescriptive rules, the traditional analytical study, and a study of the "real rules," the descriptions of judicial behavior, the new empirical science of law. The question of whether judges actually follow the "paper rules" is not pertinent to the study of the "real rules," for the "real rules" are expressive of the court's behavior, and are not concerned with the judge's reasoning process in making and justifying his decision.

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68. *Id.* at 444.

69. *Id.* at 448 (emphasis in original).

It should be noted that if one tries to discover with which of these two different types of study Llewellyn was truly concerned — the study of whether judges follow the “paper rules,” the “working rules” study, or the study of a descriptive science of judicial behavior, the “real rules” study — and, if one looks to Llewellyn’s later work for a clue, the answer is that he was interested in both. Llewellyn’s writings about the decision process have been a great contribution to the understanding of how judges reach their decisions, and how they justify or explain their decisions in their opinions. But Llewellyn’s contribution in the other sphere has also been significant.<sup>70</sup>

Llewellyn also proposed a type of study which bears some resemblance to the theories discussed below, that is, his definition of “law” as “what officials do.” But Llewellyn did not pursue this approach after his first few years of jurisprudential activity, for, in his articles in later years, he is quite explicit about the fact that he is not attempting to define “law,” and that he considers “rules of law” to be prescriptive rules. In the same article in which he presents the “real rules” theory, he states at six different places that he is not concerned with the definition of law, but he is presenting what should be the “focal point” of legal studies:

I shall instead devote my attention to the *focus* of matters legal. I shall try to discuss a *point of reference*; a point of reference to which I believe all matters legal can most usefully be referred, if they are to be seen with intelligence and with appreciation of their bearing.<sup>71</sup>

Therefore, this theory is not a definition of law and does not necessarily exclude from the field of law items that are generally considered part of it. It is the exclusive nature of Llewellyn’s definition of law that differentiates that theory from this one, and also from the theories we will discuss below. The problem the “real rules” theory poses is whether the study of behavior without first employing some conception of law to distinguish legally relevant behavior from non-legally relevant behavior, or, in other words, the study of behavior without reference to the prescriptive rules governing this behavior, is the most desirable focal point in the study of the operation of a legal system.

Our last theory appears to be deceptively similar to those of the explanatory group, but the difference, while subtle, is of far-reaching

70. See Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355 (1940); LLEWELLYN & HOEBEL, *THE CHEYENNE WAY* (1941); Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940); Llewellyn, *Law and the Social Sciences — Especially Sociology*, 62 HARV. L. REV. 1286 (1949).

71. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 432 (1930) (emphasis in original). See also *Id.* at 435, 442, 443-44, 455-56, 464.

importance, for the criticism of this theory must, to be effective, concern itself with an entirely different problem. This theory differs from the first three, and is, instead, the extreme form of Llewellyn's "real rules" theory. While Llewellyn is presenting an empirical science of law that is to exist in conjunction with an analytical science of "paper rules," this theory involves a more direct onslaught on the analytical science of law, and the theory can be interpreted as including a denial of the normative character of legal rules.

Despite this theory usually being associated with Cook, we would like to present Bingham's account of it because Bingham's account lends itself more easily to discussion. Bingham's objective is to show that the task of the lawyer is similar to that of the scientist. The scientist deals with sequences of concrete phenomena,<sup>72</sup> and uses generalizations to communicate his knowledge of these concrete phenomena to others.<sup>73</sup> If the science is not solely historical, the scientific laws are also used to predict future occurrences.<sup>74</sup> The lawyer is similarly involved in the study of concrete phenomena:

The lawyer, as does the scientist, studies sequences of external phenomena and he studies them with a similar purpose — to determine their causes and effects and to acquire an ability to forecast sequences of the same sort.<sup>75</sup>

Since the field of law is part of the science of government,<sup>76</sup> the question naturally arises whether the "laws" of the field of law are similar to other scientific laws. Bingham's statement about the nature of judicial generalizations (that is, legal rules) is as follows:

First: — Often judicial generalizations summarize past concrete decisions or their reasons and many do not purport anything else. . . . These summaries have no logical authoritative force upon future decisions.

Secondly: — Judicial generalizations often, expressly or by implication, purport also to predict legal consequences. Sometimes they purport to dictate or authoritatively promise decisions of certain sorts. . . .

Thirdly: — Judicial generalizations may be considered as elements in the causal procession of events towards the decision of the court. In this aspect they must be weighed and analyzed with the other interrelated facts in order to determine their causal efficiency in inducing the decision.<sup>77</sup>

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72. Bingham, *What is the Law?* 11 MICH. L. REV. 1, 6-7 (1912).

73. *Id.* at 7.

74. *Id.* at 8.

75. *Id.* at 9.

76. *Id.* at 8.

77. *Id.* at 15-16.

Bingham's contention is that legal rules are rules of the third type mentioned above. He concludes that the law does not consist of these generalizations but consists of the concrete phenomena of judicial action.<sup>78</sup>

Since the law is composed of these concrete phenomena, generalizations or rules of past judicial conduct can be assembled by anyone, and the test of their validity will be their usefulness:

I do not object to generalizations. In fact, I advocate careful, systematic generalization. I condemn only the acceptance of any generalization of law as accurate or efficient for the purposes of comprehending a part of the field of the law simply because of its source. Legal generalizations, as other generalizations, should be approved or condemned according as they satisfy or fail to satisfy the demands of accuracy and efficiency.<sup>79</sup>

The test of the validity of the rule is solely its accuracy: has it accurately predicted the future concrete decisions of the courts?<sup>80</sup> That Cook reached a similar conclusion, though by a different route, should be evident from the following statement:

As lawyers we are interested in knowing how certain officials of society — judges, legislators, and others — have behaved in the past, in order that we may make a prediction of their probable behavior in the future. Our statements of the 'law' of a given country are therefore 'true' if they accurately and as simply as possible describe the past behavior and predict the future behavior of these societal agents. A statement, for example, that a certain 'rule of law' is the 'law of England' is therefore merely a more or less convenient shorthand way of saying that, on the basis of certain observations of past phenomena, we predict certain future behavior of the appropriate English officials.<sup>81</sup>

The study of law must concern itself with observing and reporting these concrete governmental phenomena in order to develop more "accurate" generalizations of legal behavior.

78. *Id.* at 121. See also BINGHAM, *MY PHILOSOPHY OF LAW* 7, 21-22 (1941).

79. Bingham, *Legal Philosophy and the Law*, 9 ILL. L. REV. 98, 110 (1914). See also Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 23 (1912). Consider the following:

Like word meanings they are not things that are essentially a product of the officials of government, but may be the invention of anyone who chooses to devise them. Not only judges but anyone can make a rule or principle of law and the only test of the validity of a rule or principle of law whether devised by a judge or a student, or a layman is the test of its usefulness as a tool of professional thought. Insofar as a rule correctly indicated all the governmental actions within its scope, it is a valid rule of law. Insofar as it fails to do this, its validity is impaired.

BINGHAM, *MY PHILOSOPHY OF LAW* 7, 22-23 (1941).

80. Bingham expressly states that "[i]ts validity is to be tested by ascertaining whether it accurately indicates potential concrete decisions within its scope." Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 23 (1912).

81. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 475-76 (1924).



Bingham's conclusion is as follows:

. . . [L]aw consists of the flux of concrete occurrences and their legal consequences brought about through the operation of authoritative governmental law-determining machinery and . . . the essential field of legal study consists of such actual sequences and the potentialities of similar future sequences.<sup>82</sup>

Cook's conclusion is very similar:

In order to keep in mind and utilize effectively the large number of concrete instances of such past conduct, a record of which he [a lawyer] finds in reports of decisions, statute books, etc., he finds it necessary to form certain more or less general concepts which he unites into statements or propositions which he calls rules and principles of law. These rules and principles are mental tools which are useful and effective in so far as they give an accurate picture of past legal phenomena and enable the one forming them to state accurately just what it is that he predicts will happen in the future.<sup>83</sup>

In conclusion, it should be mentioned that this is a theory about the nature of legal study and the use of the law by lawyers.

Before moving on to the criticisms of these theories, we would like to offer a brief summary of them. The first three, the explanatory theories, Frank, Oliphant, and Moore, and one might add Llewellyn's theory of "working rules," are all primarily concerned with the question of how a judge reaches his decision, and the factors entering into it. All three are skeptical of the compulsive effect of legal rules in determining all decisions, though they may recognize that legal rules are of a normative nature. All three are striving to find some other factor that is present in the decision process, recognition of which will lead to greater predictability. Frank's theory is largely undeveloped, and is just a proposal for study of the "real reasons" for judicial decisions. Oliphant finds that the constant factor in the judge's decision is his response to the stimulus of the facts of the case before him, and Oliphant proposes a study of these responses in order to be able to predict more accurately future responses. Moore finds that the constant factor in judicial decisions is the deviation of the facts of the case from the institutionalized behavior of the society, and he calls for study of these deviations in order to predict how judges will decide. All three are concerned with how the judge reaches his decision.

82. Bingham, *The Nature of Legal Rights and Duties*, 12 MICH. L. REV. 1, 3 (1913).

83. Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, 5 LECTURES ON LEGAL TOPICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 337 (1924).

The second group is not concerned with how the judge reaches his decision but is concerned with an external study of the law, the description of the judicial decisions. Llewellyn recognizes the analytical study of the law, but is proposing that a descriptive social-scientific study also be conducted. Bingham and Cook, presenting a more extreme view, deny that the lawyer's task is the traditional analytical study of the law. As far as the descriptive group is concerned, an empirical study of the law can be conducted regardless of one's views about the normativeness of legal rules. This does not mean that such a description of law accords with the usual conception of law.

In a sense, then, Cook and Bingham are closer to Frank than to Llewellyn, for all three place less emphasis on the normative nature of law than does Llewellyn. However, Frank's solution is to study the psychological processes leading to the decision; whereas, Bingham and Cook propose a "scientific" study of the law, a description of judicial behavior in "causal" terms.

There is one point of considerable difficulty about which we would like to add some further comments, and that is whether the descriptive group is necessarily implying that judges do not apply legal rules in reaching their decisions. It is our contention that this is not necessarily implicit in the theory, but is an obvious corollary of Bingham's and Cook's brand of the descriptive theory. These theories are not concerned with the psychological process of reaching the decision; they are a description of the decisions that have been reached. The contention is that this description can be in non-normative terms, in terms of regularities of judicial conduct. Anyone can make these generalizations of past judicial behavior. It is possible, then, for judges to follow these generalizations in an effort to conform to past behavior. This would account for the predictability of judicial decisions.

It is also possible, however, for judges to reach their decisions in any way they choose. The decisions can still be described in generalizations, just as we can describe the expansion of iron when heated even though the present iron molecules have no idea of imitating the behavior of past iron molecules. Indeed, this theory can be viewed as solely descriptive, and in no way explanatory of, or even connected with, the process by which judges reach their decisions. It should be clear, therefore, that this theory can be asserted in conjunction with the belief that judges do attempt to follow past judicial generalizations, so that the judicial process can be described in terms of the external viewpoint as well as in terms of the internal psychological impact of the rules upon the judge. Recognition of the "internal" aspect of the legal rules is not necessarily relevant to whether the judge's be-

havior can be described in solely descriptive terms. In fact, Llewellyn's "real rules" theory is an attempt to do this without necessarily denying the normative character of legal rules.

The alternative to Llewellyn's theory is that this descriptive exposition of the legal rules can be viewed as the only possible way of describing judicial behavior. It is obvious that, to accept this theory, and to use it for predictive purposes, one must reach some conclusion concerning an explanation of its predictive powers. One possible explanation is that judges "follow" the precedents created by their predecessors. But one can ignore that explanation, and attempt to create solely a statistical correlation between past and present judicial behavior. But what is it that enables us to predict future judicial behavior using this statistical correlation? Can the predictability in the law be explained without considering the judge's reaction to the legal rules? We again emphasize that this is not necessarily implicit in the theory, but the problem arises when the reason for the possibility of prediction is demanded. It is conceivable that judges do try to apply the legal rules, but that knowledge of these legal rules alone will be of small predictive value. It is possible to interpret Cook as having this belief.

It is when this question of the explanation for the predictability of these generalizations is raised, and an explanation is offered that does not include the judge's relationship to the legal rules, or no explanation is proffered, that the proximity of this last group with our first theorist is obvious, and our circle is completed. It is the doubt about the predictive value of a normative conception of legal rules that has led the explanatory group to look for other factors present in the decision process in order to predict the decisions more accurately. It is this same doubt which leads our last two theorists, Bingham and Cook, to assert that a scientific study of law must phrase "legal rules" in descriptive terms.

#### IV.

##### CRITICISM OF THE EXPLANATORY THEORIES

Before discussing the merits or inadequacies of each of the theories outlined above, some of the misconceptions that are prevalent in this area will be treated. It should be obvious by now that we would disagree with the implication of Professor Kantorowicz's otherwise brilliant critique of the realists that the realists are in agreement about the nature of legal science.<sup>84</sup> To show that there is no such agree-

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84. Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240 (1934).

ment and that, in fact, there are significant differences among the realists has led us to construct this elaborate classification of their theories.

We also strenuously contend that Dean Pound's characterization of the realists' empirical science of law as an attempt to create a science that would give us "rigidly exact" formulas<sup>85</sup> is grossly inaccurate, and we could probably find a quotation in the writings of almost every realist who has discussed this problem that would invalidate that criticism.<sup>86</sup> In fact, Pound himself quotes a passage from Moore that clearly refutes this contention.<sup>87</sup> We also hope that this discussion will clarify statements appearing in the standard jurisprudential textbooks to the effect that either the realists do deny the normative character of legal rules<sup>88</sup> or that the realists do not deny the normative character of legal rules.<sup>89</sup>

There is no need to comment on Frank's attempt to find the "real reasons" for judicial decisions except to note that little came of this proposal other than the statement of it. Frank himself was doubtful about its utility. While it would be useful to know the psychological reasons for judicial decisions, there is little likelihood of expecting any advances in this area until psychology develops sufficiently to be of some aid. To expect students of law to discover the hidden springs of behavior is fatuous.

85. Pound, *A Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 702-03 (1931).

86. For example, see Oliphant and Hewitt, *Introduction to RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES* xxix (1929); Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEXAS L. REV. 127, 130 (1932); Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303, 307 (1927); Radin, *Scientific Method and the Law*, 19 CALIF. L. REV. 164, 170 (1931); Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1229-30 (1931).

87. The problem is to predict the judicial behavior of a particular judge at a particular time and place in an uncontrolled environment. If the judicial behavior of every judge in the past had been correlated with every significant element in the situation including his behavior, and had the procedure netted very precise applicable laws, yet a prediction as probable as that of the physicist predicting the result of a time-worn experiment would not be possible.

Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 703-04 (1927), quoted in Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 777, 788 (1938).

88. For example, consider the following:

Now usually, what the judge says assumes the form of principles, rules, or concepts. These the realist tells us have no binding power to fix the form of the law in the future, for they are not law in and of themselves.

REUSCHLEIN, *JURISPRUDENCE: ITS AMERICAN PROPHETS* 185 (1951). Also, cf. DIAS & HUGHES, *JURISPRUDENCE* 469 (1957).

89. For example, consider the following:

The realist does not in effect deny the normative character of legal rules. What he says is that these norms do not provide a certain clue to the actual behavior of the courts, legal officials or those engaged in legal transactions. If we are to understand the actual working of law in human society it is not enough simply to peruse a collection of the relevant legal norms for these tell us but little about actual 'legal behavior' in the sense of how legal business is in fact transacted.

LLOYD, *INTRODUCTION TO JURISPRUDENCE* 209-10 (1959). Also, cf. DIAS & HUGHES, *JURISPRUDENCE* 476-77 (1957).

Kantorowicz asserts that, if Frank's ideas were adopted, "the proper study of the law student would be the behavior of individual judges; such a study would be not only farcical but also useless."<sup>90</sup> While this comment may have been warranted by some of Frank's other writings, the attempt to find the "real reasons" behind judicial decisions need not result in such a violent change in legal study. The proposal is, instead, similar to Frank's other suggested reforms designed to aid the law schools to prepare their students for the actual practice of law.<sup>91</sup> As with many of Frank's other suggested reforms, the practical implementation of his suggestion creates many problems which he fails to consider adequately.

Indicative of the disagreements among the realists is the fact that it is the difficulty of finding the "real reasons" behind judicial decisions which leads Oliphant to develop a seemingly behavioristic theory. Conversely, Frank is very critical of Oliphant's theory. Frank emphasizes the great difficulty of finding which facts in the record stimulated the judge, even going so far as to label the attempt to find them a form of the basic legal myth.<sup>92</sup>

Oliphant never clearly indicates how the important facts that will be considered to be part of the stimulus are to be found, for surely we cannot consider all the facts surrounding the decision to be relevant in an analysis of that decision. Dr. Goodhart has convincingly shown that the facts which the judge considered relevant to his decision are the facts which he includes in his opinion, and it is the opinion rather than the record which should be examined.<sup>93</sup> Furthermore, it would be exceedingly inconvenient for counsel to have to search the records whenever they cite a case. While it is possible to argue that a fact in the record should have been, or was, treated by the court

90. Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1252 (1934).

91. FRANK, *What Constitutes a Good Legal Education?*, 19 A.B.A.J. 723 (1933); *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); *A Disturbing Look at the Law Schools*, 2 J. LEGAL ED. 189 (1949); *COURTS ON TRIAL* 225 (1949). Frank suggests that law teachers should have five to ten years of experience practicing law, that the case-system should be expanded to include accounts of the entire trial and not just the appellate opinions, that law students should be encouraged to visit courts while trials are in session, and that the law schools should have legal aid clinics where the students can obtain some practical experience. Most of these suggestions follow from Frank's questionable assumption that the practice of law can be compared to semi-mechanical skills such as playing golf, swimming, automobile-driving, or dancing. Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A.J. 723, 725 (1933).

92. The attempt to find the relevant facts in a 'contested' case by turning from the opinions to the records is almost sure to end in futility. That attempt seems to be the consequence of a new subtle form of the basic legal myth of legal certainty (*sic*).

Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 761, 770 (1932).

93. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169 (1930).

as material to its decision, even though it is not mentioned in the opinion, the task confronting the advocate arguing this point will no doubt be difficult. It is precisely Oliphant's failure to consider the judge's opinion as part of the judge's response which is the weakest part of his theory.<sup>94</sup>

One further point is that the facts which will comprise the record will be included within it because they are legally relevant as determined by legal rules. In order to determine which facts are to be regarded as part of the stimulus, we must begin with the realization that legal rules indicate which facts are legally relevant and, therefore, which facts will be considered important by the judge and even which facts will be brought to his attention. Any theory which emphasizes the facts before the judge in disregard of the rules indicating in general terms which facts will be before the judge is necessarily somewhat misleading.

One of the reasons why Oliphant disregarded the opinion is that the opinion frequently contains over-generalizations and inaccurate statements about the legal rules underlying the decision.<sup>95</sup> It is this fact that illustrates that Oliphant's theory is not only an explanation of the judicial decisions, but also a technique for analysis of them, a method of more accurately determining the legal rules which are established by judicial decisions. With this in mind, Oliphant's statement about over-emphasis of the judge's "vocal behavior" is understandable. The point is that there has been too much reliance on the judge's statement of the rule constituting the holding of the case rather than a critical analysis of the case itself. Dr. Goodhart has similarly emphasized that we need not rely on the judge's statement of the rule underlying the case as necessarily being the *ratio decidendi* of that case,<sup>96</sup> and Professor Patterson has pointed out that Oliphant's analytical technique is now accepted by scholars and by courts.<sup>97</sup>

It is submitted that what Oliphant calls a stimulus is in reality a reason for a decision, and that Oliphant calls this reason a stimulus because he associates the judge's search for a just result with an intuitive realization of this just result. We have already discussed

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94. COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH* 173 (1954).

95. Patterson has offered an explanation of why Oliphant rejected the court's opinion as part of the response:

He rejected the opinion for three reasons, I believe: Because (he thought) it was introspective evidence; because (he thought) it was not a reliable report of a judge's mental process in deciding a case, and because his own experience as a law teacher had led him to the conclusion that opinions often over-generalize, or generalize inaccurately.

PATTERSON, *JURISPRUDENCE* 313-14 (1953).

96. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *YALE L.J.* 161, 168 (1930).

97. PATTERSON, *JURISPRUDENCE* 311, 314 (1953).

the intuitive element in the judicial process, and we need only mention at this point that Oliphant's argument for considering the justice of the resulting application of the pre-existing law to the case before the judge can be more strongly presented as an argument that judges should consciously strive for a just result rather than that judges should rely upon intuitive estimates of what this just result would be. If this suggestion were followed, Oliphant's stimulus-response terminology could be abandoned, and his theory would not be considered to be what it in reality never was, a behavioristic theory of law.

Criticisms of Oliphant for ignoring all the other possible stimuli of (or reasons for) the judge's decision<sup>98</sup> are not really fair, because, although Oliphant is conscious of the fact that there are many possible stimuli, he is attempting to find one predominant one that will enable successful prediction. He is not attempting to describe all the factors that enter into the judicial decision. Nor should Oliphant be criticized for ignoring the trial judge's difficulty in deciding which witnesses to believe,<sup>99</sup> since it is obvious that Oliphant is discussing appellate courts.

Oliphant's belief that the facts of the case were being under-emphasized and the judge's statements over-emphasized led him to devise a theory which would put the proper emphasis on the facts of the case. In contrast to this, Moore contends the opposite: it is the lawyer's emphasis solely on the facts of the case that has led him astray and accounts for his inability to predict.<sup>100</sup> Moore's theory is, in turn, designed to eliminate this over-emphasis and thereby render judicial decisions predictable, and it is this theory which will now be discussed.

There are two basic problems involved in Moore's theory: (1) whether the court does adopt the deviation-from-the-institutional-behavior standard as its norm for decision; and (2) if it does, how the court acquires the information disclosing the degree of deviation. Moore's inadequate answer to the second problem has led some to believe that Moore never intended that the deviational standard be used as the norm for decision, but that he is adopting a deterministic approach, and suggesting that there is a statistical correlation between

98. *Id.* at 313; Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 761, 769 (1932).

99. FRANK, COURTS ON TRIAL 161 (1949).

100. In greater part, however, the lawyer's limited success in formulating laws of judicial behavior is probably to be accounted for by his failure to attempt to correlate judicial behavior with any events except the 'facts of the case.'

Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 704 (1929).

the degree of deviation and the court's decision. This interpretation of Moore's theory is that he is presenting not what did happen, but what *must* happen; in other words, he is presenting us a causal relationship in the natural-scientific sense. This is a plausible explanation but it renders inexplicable much of Moore's discussion of the institutional behavior being the "reasonable, fair and just" behavior of which the court in some mysterious way is conscious. If this is truly a statistical correlation in the causal sense of natural science, there would be no need to enter into a tortured analysis of how the judge obtained the necessary information, for it would be possible to obtain the same results even if the judge were unaware of the institutional behavior. While Moore's explanation of how the judge obtains this information is inadequate, this does not warrant the conclusion that Moore was attempting a deterministic explanation of the judicial decision.

Many scholars have warned of the dangers of using statistical correlations to explain social behavior.<sup>101</sup> We maintain that Moore is probably aware of this danger, and that he is attempting to establish a causal relationship, in the popular sense of "cause," between the amount of deviation and the resultant decision. One suggested solution to this difficulty is that Moore is describing what the court should use as a standard for decision, and not maintaining that this standard is actually being used by courts.<sup>102</sup> While this also is a plausible interpretation of Moore's theory, the adoption of it renders much of Moore's explanation of his findings likewise inexplicable. The whole tone of his presentation is not that this is what ought to happen, but that this is what does happen. While an interpretation other than the one we are adopting might eliminate many of the inadequacies of Moore's theory, there are some who believe that it was the recognition of these inadequacies that led Moore to reject his original theory and adopt a different theory for his second extended study.<sup>103</sup>

Once Moore acknowledges that the judge is consciously attempting to find reasons for his decision which will justify it, Moore is clearly faced with the problem of whether the judge did in fact base his decision on the amount of deviation from institutional behavior. Leaving aside for the moment the problem of how the judge obtained this information, there is small justification for assuming that this is a proper basis for judicial action. There can be no doubt that there is a general feeling that what is commonly done is the right thing to do, but it does not necessarily follow that the custom of the com-

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101. See, e.g., COHEN, REASON AND NATURE 91 (1953).

102. PATTERSON, JURISPRUDENCE 553 (1953).

103. Northrop, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 YALE L.J. 196, 203 (1950).



munity should be, or is, the basis for judicial action. This ignores the law's effect in creating and changing community action.<sup>104</sup> There is no need for the law to follow or strengthen the community's present institutional behavior, and it can leave the maintenance of these institutions, if they are to be maintained, to other agencies of social control.

Even in negligence cases, where it would be commonly supposed that adherence to the custom of the business community would be reasonable conduct, the court still has a duty to declare whether the entire trade is creating an unreasonable risk to the community.<sup>105</sup> As Judge Hand has expressed it, a whole trade can be negligent:

Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.<sup>106</sup>

A court which considers only the institutional practices of banks has misconceived the nature of its responsibility; this responsibility involves the consideration of whether liability should be created or limited, and not the enforcement and reinforcement of contemporary banking procedures.

The patent inadequacy of Moore's discussion of the process by which the court is made aware of institutional practices that Moore had to conduct extensive investigations to discover is so obvious that it warrants little comment. Moore's explanation of the court being "indirectly conditioned" is a *deus ex machina*, an attempt to save an inadequate theory by utilization of an unsubstantiated psychological mechanism. Unless Moore can explain how the judge acquired the information on which he supposedly based his decision, the mere showing of a correlation between the decision and the amount of deviation will remain questionable as an explanation of the decision.

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104. It is clear that Moore in his initial studies ignored the effect of the law in creating institutional practices because Moore sometimes conducted his investigation of the institutional behavior subsequent to the judicial decision, and he disregarded the possibility that the institutional behavior might have changed as a result of the decision. See Moore, Sussman & Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks*, 42 YALE L.J. 817, 1198, 1207 (1933); cf. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 381, 555, 563-64 (1931).

105. See PROSSER, *TORTS* 136 (2d ed. 1955).

106. The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

Before leaving Moore, some of the other difficulties of his theory should be mentioned. It is obvious that not all the areas of legal activity will lend themselves to institutional analysis. Increasingly, law is dealing with areas of human behavior and permitting or enabling the attainment of legal consequences which were impossible to attain in the past, and in these areas there will be no institutional behavior available as a guide to the judge. For example, without a law permitting the obtaining of patents, there would be no institutional behavior relating to the obtaining of patents and the infringement of patents. The same is true of income taxes and countless other present-day commonplaces which were at one time new and for which there was no institutional behavior either prior to the promulgation of the law or immediately after its enactment. Similarly, for many laws, there can be no question of deviation from the accepted legal procedure and the institutional behavior following this accepted procedure; the deviation indicates that the desired legal consequence will not be achieved, and the question before the judge will be whether there has been compliance with the requirements established by the law. A will either meets the requirements of the Wills Act and is therefore a valid will or fails to satisfy these requirements and is therefore of no legal effect. To validate a will the lawyer does not argue that signing on the front page is not significantly different from the usual practice of signing on the last, but that signing on the front page should be regarded as a satisfaction of the requirement that "wills be signed," or "signed at the end," or "signed in some prominent place." The fact that married people generally terminate living together for any number of reasons does not mean that the law either does, or should, recognize these reasons as legally acceptable grounds for divorce.

Even in those areas where an analysis of the type Moore proposes is possible, since Moore assumes that every instance of litigation will involve a deviation from institutional behavior, it is a weakness of his theory that he gives no reliable standard to judge whether the deviation is sufficient to warrant the court's holding the bank liable. For example, in the New York case where the court found for the bank, when Moore applies his sequential analysis, the result is that two sequences are grossly dissimilar and three are slightly dissimilar.<sup>107</sup> Moore is not suggesting that these dissimilarities be merely totalled, or that the conclusion follows that there are three slight dissimilarities to two gross dissimilarities, but that the amount of dissimilarity *in toto* is to be considered. Yet he is never really convincing on the point that the

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107. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 1219, 1239-40 (1931).

New York case involves less deviation from institutional behavior than the South Carolina case.

One might be wary of Moore's possible persuasiveness at the very outset, since, in his study, one of his cases, the South Carolina one, involved an evenly divided court. It would seem that in this case at least, the "indirect conditioning" of the court was not effective on all four members and, in fact, was effective on only half of the court. Frank concludes that Moore was probably trying to show the difficulties of finding reliable prediction data and that, as a result of his study, Moore concluded that a science of legal prediction was impossible.<sup>108</sup> While we can never be sure that that was really Moore's intention, the results of his study do not engender any expectation that judicial decisions will be predictable by way of examining the degree of deviation of the behavior in the facts giving rise to the case compared to the institutional behavior of the community.

## V.

### CRITICISM OF THE DESCRIPTIVE THEORIES

In criticizing the two descriptive theories outlined above, the order in which they were presented will be reversed by discussing first the theory presented by Bingham (and Cook) and then discussing Llewellyn's proposal. Llewellyn's proposal will be clearer and more understandable once the misconceptions of the other theory are presented. We will conclude with a brief discussion depicting the area in which a realistic jurisprudence of the future could make a significant contribution to legal study.

We have interpreted Llewellyn's theory as not denying that an analytical science of law, the traditional analytical study and systematization of the legal rules, is possible, and as suggesting that there should be an empirical science as well as the analytical science. In discussing Bingham and Cook, we are immediately faced with the problem of whether they are offering an empirical science that will exist in conjunction with the analytical science of law, or whether they are asserting that the proposed empirical science of law is the only possible science of law, thereby denying the possibility of an analytical science of law. Cook explicitly denies that he has ever contended that his empirical science of law was meant to be a substitute for the analytical science of law.<sup>109</sup> The same problem exists, but is

108. FRANK, COURTS ON TRIAL 340 (1949). Cf. Northrop, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 YALE L.J. 196 (1950).

109. Cook, *Legal Logic*, 31 COLUM. L. REV. 108, 109 (1931). See also Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEXAS L. REV. 127, 138-39 (1932).

only pushed one step back, if we move the inquiry to the question of whether Cook's statements about the nature of legal rules are intended to be descriptive of legal rules or are primarily a reference to his conception of legal rules solely in regard to the empirical science. The problem, then, is one of whether Cook is asserting that this is the nature of rules of law or that *for the purpose of an empirical science of law* this is the nature of rules of law.

Let us consider Cook's statement about the description of the behavior of judges in order to see if that will clarify the problem:

He [the lawyer] knows how they [the court] or their predecessors have acted in the past in many more or less similar situations. He knows that if without reflection the given situation appears to them as not differing substantially from those previously dealt with, they will, as lawyers say, follow precedent. This past behavior of the judges can be described in terms of certain generalizations which we call rules and principles of law.<sup>110</sup>

It is difficult to dispute that common law rules do, in a limited sense, describe past judicial behavior. The problem is whether they encompass more than this generalization of past behavior so that future cases can be considered as included within the expressions of this past behavior. In other words, are these generalizations limited to descriptions of the past behavior?; are they, to use a more appropriate term, summations of past behavior?

The further problem that is presented by this description of legal rules is to discern the connection between these summations of past behavior and the judge in a present case. Do these rules and principles in any way permit a "following" of them so that it is intelligible to state that the judge has "applied" an existing rule that covered the case before him? Or, are these rules and principles solely generalizations of past behavior, so that there is no sense in which they can encompass a case that would not fall within the ambit of "past behavior," such as a case now before the court? Cook, on the same page in which the above quotation appears, clarifies his conception of these rules as far as their operation within the society is concerned: ". . . [H]uman laws are devices, tools which society uses as one of its methods to regulate human conduct and to promote those types of it which are regarded as desirable."<sup>111</sup> The problem is whether these legal rules have a somewhat similar relationship to the judges, so that there is a sense in which the rules regulate judicial conduct.

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110. Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303, 308 (1927).

111. *Ibid.*

Let us turn now to Bingham who discusses the problem of this relationship of the empirical generalizations to the judges, but, in discussing it, presents even more of an enigma than does Cook. Bingham, whom Llewellyn referred to as the first realist<sup>112</sup> and who refers to himself as a realist,<sup>113</sup> bases his philosophy of law on an unusual assumption that is not wholly necessary to his argument and does not contribute to its persuasiveness. He asserts that no two persons can conceive of "the same rule" and, therefore, there can be no external body of rules called the law.<sup>114</sup> Since other realists were able to arrive at a similar conclusion as Bingham without adopting this premise, this aspect of the development of his philosophy will be disregarded.

Moving to the problem of whether Bingham's empirical science of law involves a denial of the value of an analytical science of law, several statements in Bingham's writings can be found indicating his belief that an analytical study of legal rules, the rules being expressed in prescriptive terms, involves a misconception of the true nature of legal rules. He asserts that definitions of law that consider law to be a body of prescriptive rules are in error,<sup>115</sup> and that it is incorrect to conceive of generality as being the essence of law.<sup>116</sup> Generality cannot be the essence of law because courts are empowered only to decide specific cases before them; courts cannot decide moot cases.<sup>117</sup> Rules and principles employed in judicial opinions have no authoritative force.<sup>118</sup> The judge's responsibility is to decide the case before him, and he has no legal power to bind the court in later cases.<sup>119</sup> It naturally follows that the law is composed of a series of past concrete events, and the essence of a study of these concrete events will be the formation of generalizations describing them which can be utilized for prediction of future concrete events. The model for such a science will be, of course, the physical sciences.

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112. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1244 (1931). Cf., however, Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 n.3 (1934).

113. BINGHAM, *MY PHILOSOPHY OF LAW* 7, 13 (1941).

114. . . . [R]ules are transient, mental things, and . . . there is no real identity between a rule in the mind of A and a rule in the mind of B which in common speech would be called 'the same rule.' It follows, of course, irresistibly that there can exist no such external entity as a body of rules and principles which may be pointed to as 'the law.'

Bingham, *Legal Philosophy and the Law*, 9 ILL. L. REV. 98, 114 (1914).

115. Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 3 (1912).

116. *Id.* at 12-13.

117. *Id.* at 18.

118. *Id.* at 15-16.

119. The essence of the judicial process is the determination of the case in hand and nothing more. There is no legal power in a court to bind itself or any other court — whether the judges remain the same or are changed — to any course of decision of indeterminate future cases.

BINGHAM, *MY PHILOSOPHY OF LAW* 7, 20-21 (1941).

One might conclude from this discussion that there can be no doubt that Bingham is denying the existence of legal rules in a prescriptive sense or, at the very least, is declaring that such a view of legal rules is mistaken and that the only intelligible view is the one he suggests. However, it must be admitted that, at some places in the development of his argument, it appears that he is addressing himself only to the empirical science he proposes.<sup>120</sup> In fact, Bingham even asserts that the lawyer uses rules and principles in the prescriptive sense and these rules and principles can properly be called "law," but that he is discussing another possible meaning of "law."<sup>121</sup> Furthermore, he contends that, to understand the phenomenon of law, one must not look at law from the viewpoint of the judge or lawyer. Rather, an objective external viewpoint must be taken.<sup>122</sup> But consider Bingham's conclusion:

The lawyer, as does the scientist, studies sequences of external phenomena and he studies them with a similar purpose — to determine their causes and effects and to acquire an ability to forecast sequences of the same sort.<sup>123</sup>

Should we conclude that Bingham is declaring that his description of the empirical science of law is in reality what lawyers do and is their (lawyers') conception of the law, or should we conclude that Bingham is suggesting a possible empirical science of law that will be supplementary to other possible ways of studying law? No matter how we answer this question, we will at least have to discuss whether the study of legal rules can be conducted in the way that a natural scientist studies his data.

One might ask whether such a description of past cases, assuming that it is intelligible to conduct such a study despite the vast difference between the operation of laws of nature and legal rules, will be of any value. The claim made for this description is that it will enable us to predict future governmental action. We must then ask what factor in the judicial process or in legal study accounts for this possibility of prediction. If this factor involves judges looking upon legal rules in a prescriptive sense, then it is this prescriptive sense of legal rules that permits the possibility of such a description. We are clearly then faced with a choice between describing law in terms of pure descriptive generalizations of past judicial behavior or in terms of prescriptive rules. If it is admitted that the prescriptive sense of legal rules

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120. See especially Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 9 (1912).

121. BINGHAM, *MY PHILOSOPHY OF LAW* 7, 10 (1941).

122. Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 10 (1912).

123. *Id.* at 9.

is not only possible but lies at the basis of the descriptive-generalization type of expression of legal rules, then we can discuss its value in that regard. That is similar to Llewellyn's position as we have outlined it above. If the contention is, however, that the descriptive-generalization expression of legal rules, the non-prescriptive expression, is the way we either commonly conceive of law or should conceive of law, then we are faced, at the very least, with a disparagement of the value of a prescriptive description of legal rules.

The description of legal rules in prescriptive terms must be defended in regard to the impact of these rules on the ordinary citizen. We will have to demonstrate that these rules are not similar to laws of nature, but that there are important differences that must be recognized. In regard to the effect of these legal rules on judges, we will have to show that we can predict future judicial behavior only, because judges try to reach decisions in conformity with their past decisions. In other words, the continuity between the past and the present is not an unprovable assumption as in the natural sciences, but it is a result of a contrived, volitional attempt on the part of the judges to reach decisions that could have been predicted if one had consulted their past decisions.

The most obvious difference between laws of nature and rules of law is that the former are concerned with describing the actual course of a series of events whereas the latter are used to control events and tell you nothing about the behavior of the parties being controlled. In other words, the rules of law are used to promote behavior; the laws of nature are used to describe behavior. In Dickinson's language, a rule of law "is not a descriptive statement which attempts to summarize an observed sequence of external happenings," but is instead "a series of directions or instructions which are rules of action designed to bring about certain supposedly beneficial social results."<sup>124</sup>

This leads to the second great difference between laws of nature and rules of law: a law of nature can be refuted by the demonstration of one single instance that fails to conform to the law (in that event, the law will have to be reformulated); a rule of law, however, is not affected by a demonstration of behavior which fails to conform to the law in question.<sup>125</sup> The rule of law, in effect, presupposes its own non-observance and is used to foster observance. Lauterpacht emphasizes this difference between the two types of laws:

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124. DICKINSON, *MY PHILOSOPHY OF LAW, CREDOS OF SIXTEEN AMERICAN SCHOLARS* 91 (1941).

125. See COHEN, *REASON AND NATURE* 78 (1950).

In normative sciences the word law is used in an entirely different sense. It lays down rules which prescribe right conduct. The rules of logic, grammar, ethics, aesthetics, and law are normative rules. They do not predicate what actually happens; their existence is not impaired by the fact that they are disregarded in individual cases. The rules of English grammar will survive anything that may be said in this lecture. But the law of gravitation would not survive if it were demonstrated beyond possible doubt that on a single occasion an object failed to behave in accordance with that law.<sup>126</sup>

To depict accurately the operation of legal rules one must not forget that they are used to control behavior, are used as standards for behavior, and are used to criticize deviations from the accepted standards. Herein lies the inadequacy in viewing them solely externally.

A science requires some sort of system, a connection between the parts of the science, that will allow us to discuss the relationship of the parts to other parts and to the whole.<sup>127</sup> The acts of judges are related to each other by rules establishing the judicial capacity of individual judges and prescribing proper judicial conduct. We can construct laws of judicial behavior expressing uniformities in judicial conduct, but, to devise a system, more than this is needed, namely, the rules showing the connection between present judicial acts and past judicial acts.<sup>128</sup>

One way to express such a system is by describing the rules which tell judges what to do and in fact authorize them to act as judges; Professor Hart calls these the secondary rules of the system. Then, we can describe the rules derivable from acts of judges, as far as the ordinary citizen is concerned, in prescriptive terms; Professor Hart calls these the primary rules. Kelsen demonstrates the difference between the law of nature and the rule of law in this prescriptive sense:

The rule of law and the law of nature differ not so much by the elements they connect as by the manner of their connection. The law of nature establishes that if *A* is, *B* is (or will be). The rule of law says: If *A* is, *B* ought to be. The rule of law is a norm (in the descriptive sense of that term). The meaning of the connection established by the law of nature between two elements is the 'is' whereas the meaning of the connection between two elements established by the rule of law is the 'ought.'<sup>129</sup>

126. Lauterpacht, *Kelsen's Pure Science of Law*, MODERN THEORIES OF LAW 108-09 (1933).

127. COHEN, REASON AND NATURE 107 (1950); COHEN & NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 120 (1934).

128. Cohen, *Philosophy and Legal Science*, 32 COLUM. L. REV. 1103, 1123 (1932).

129. KELSEN, GENERAL THEORY OF LAW AND STATE 46 (1949).



Our traditional means of expression of rules of law is in the form of prescriptive statements, and the traditional study of these rules is by developing them into a coherent system. Our vocabulary presupposes this conception of legal rules: in what other sense can laws be *observed, obeyed, applied, broken, violated, ignored, repealed*? None of these terms are intelligible if the legal rules are not considered to be prescriptive rather than descriptive statements.

Some of the confusion in this area is the result of the failure to recognize that rules of law expressed in prescriptive terms are descriptive; an analytical science of law, in other words, is also an empirical science of law in the sense that the rules of law are discoverable only by observation of behavior. An analytical science of law can not be a purely formal science for the obvious objection to this is that it does not start with just any postulates but accepts as postulates the laws valid in a particular jurisdiction at a particular time. It is true, as Cook argues, that only empirical observation can tell us what these laws are.<sup>130</sup> The point at issue is whether the description of these laws that are empirically derived should be in terms of ought-statements or in terms of is-statements,<sup>131</sup> and the point we have tried to establish above is that the use of is-statements based on the natural-science analogy misconceives the true operation of legal rules within the society. To express accurately this operation, we must phrase our legal rules in prescriptive terms.

As far as the ordinary citizen is concerned, then, the generalizations of past judicial behavior appear to him in the form of rules telling how he *should* or *must* behave. Bingham could try to salvage his theory by arguing that the ordinary citizen's impression of these legal rules is that their importance enables him to avoid unfavorable future judicial action. This is similar to Holmes' theory of the bad man, and this theory is inadequate if we consider the operation of rules of law as far as the average citizen is concerned. Let us here concede the point, however, in order to develop the argument further. Bingham would then assert that these generalizations of past judicial behavior allow the bad man to predict future judicial behavior. Now we can clearly delineate the prime inadequacy of this theory.

If these generalizations are restricted to solely past judicial behavior, then they are not relevant to future judicial behavior unless we add some connecting factor. Bingham could argue that judges, like molecules, repeat themselves. But this just puts our inquiry back one step. Why do judges repeat themselves? Bingham must admit, at this

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130. Cook, *Legal Logic*, 31 COLUM. L. REV. 108, 112-13 (1931).

131. See Kelsen, *GENERAL THEORY OF LAW AND STATE* 163 (1949).

point, that judges consciously attempt to reach decisions by applying rules established by the past decisions. We need not assert that judges ought to do this, but, only, that as a matter of fact, they do.

Should we not try to look at the judicial process from the viewpoint of the judge, not from an external viewpoint of a series of observed uniformities? Here we can see the inadequacy of Bingham's theory. He is disregarding the element in the judicial process that allows predictability. He could not predict future judicial action if judicial decisions were isolated facts depending on the idiosyncrasies of varying judges. He can predict only because judges try to apply existing rules. If he is devising his science in order to enable him to predict future judicial activity, then he cannot in all fairness exclude from consideration the one factor in the judicial process which makes prediction possible.<sup>132</sup>

## VI.

### CONCLUSION

The rules of law will be descriptive of past judicial activity, but the description will be in the form of general rules expressed in prescriptive terms. The analytical study of these rules involves assembling them into a systematic and coherent account of past judicial activity so that citizens who want to avoid unfavorable future judicial activity or who want to conform to the rules of the system will be able to use them as guides to future judicial activity. The prediction of this future judicial activity is possible only because judges consciously desire to reach decisions that are, as far as possible, applications of rules established by the decisions reached in the past.

Kelsen appears to go further than this: he argues that there is no possibility of the results derivable from the type of study Bingham is advocating differing from the results obtainable by his normative science of law. Kelsen's expression of this is as follows:

The only relevant question is, whether the judge will apply the law — such as it is described by normative jurisprudence, that is as a system of valid norms — in a concrete case. And the only prediction possible on the basis of our knowledge of facts is that as long as the total legal order is efficacious on the whole, a certain probability exists that the judge in question will actually apply the valid law. If, for some reason or another, he fails to do so, this is no more relevant to sociological jurisprudence than is to physics the case where heat does not make the mercury in

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132. For a discussion of this problem, see Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 839-41 (1931).

a thermometer rise because by accident the thermometer has been broken.<sup>133</sup>

We submit that there is an area in which Bingham's type of study, or more accurately the type of study proposed by Llewellyn, can make a contribution to an understanding of the judicial process. Kelsen's view is premised on the assumption that deviation from what we call the pre-existing law involves a breakdown in the system, the broken thermometer analogy. We contend that it may be desirable to deviate from pre-existing law if the demands of justice or wisdom (which we use to mean "the consequences of the decision for the society") are sufficiently compelling.

In defending this position, Kelsen is forced to adopt what appears to be a *deus ex machina* that need not necessarily be representative of the actual functioning of the legal system, namely, Kelsen's employment of the doctrine of *desuetudo*. Note Kelsen's following statement:

. . . A norm is a valid legal norm if (a) it has been created in a way provided for by the legal order to which it belongs, and (b) if it has not been annulled either in a way provided for by that legal order or by way of *desuetudo* or by the fact that the legal order as a whole has lost its efficacy.<sup>134</sup>

With all due respect, it would seem that, if *desuetudo* is not a mode of annulment permitted by the legal order, then it cannot legally operate. There appears to be no theoretical barrier to declaring that a universally violated statute or common law rule is still law in the sense of being an accepted prescriptive rule of the legal system. In fact, a social study revealing the extent of observance of laws would seem to be a valid area in which sociological jurisprudence could contribute to an understanding of the operation of law within a society. The only way that legal rules can be valid or invalid is by reference to a rule of recognition, and, if this rule of recognition does not include within it the non-validity of legal rules by reason of *desuetudo*, then it would appear that Kelsen must admit that the rule in question is still a valid rule of the system.

The price involved in maintaining this agreement of the results of normative jurisprudence with those of sociological jurisprudence includes the loss of the value of the normative conception of law. We are willing to agree with Kelsen that this normative conception of law must be central in legal study, and in admitting this, we are willing also to admit its further implication. The results of normative juris-

133. Kelsen, *GENERAL THEORY OF LAW AND STATE* 174 (1949).

134. *Id.* at 120. See also *Id.* at 173 where Kelsen refers solely to statutes.

prudence may differ from those of sociological jurisprudence. This should occasion no surprise, however, since all it indicates is that the subject of inquiry for the two studies is not the same. The presentation of this difference of subject-matter, and, therefore, of results, both illustrate the central place of normative jurisprudence and the area in which sociological jurisprudence can contribute to legal study.

Kelsen contends that, in any social study of legal phenomena, the scholar must employ some concept of valid law in order to distinguish the phenomena he will study from all the other social phenomena.<sup>135</sup> In other words, the focal point for a study of the law, or the effect of law on society, cannot be behavior, as Llewellyn maintains. In order to know what behavior to view, we need some reference to a criterion indicating the validity of law so that legally-related behavior can be differentiated from all other behavior. An example will illustrate this. If we were to watch a state official in a marriage license bureau ask each couple their ages when they apply for a marriage license, and, after their response, not note their answer in any way but hand them the relevant form, we might conclude that he is just curious about the ages at which people marry. Since it is generally known that the law will permit marriages only of persons over twenty-one years of age in this jurisdiction, it is quite possible that it might be many years before someone requested a marriage license and was refused one because he was under twenty-one years of age, and only then would we see the significance of the official's question. Without some acknowledgment that there is a legal rule permitting marriages only of persons over twenty-one years of age, the official's questioning is without any significance, or, at least, cannot be explained by focusing solely on his behavior. In all fairness to Llewellyn, we should add that he appears to have modified his original position, and he has declared that the "legal" is "*the needed keystone to integration of fundamental sociological theory.*"<sup>136</sup>

Let us now examine the area of legal study that is generally regarded as included within sociological jurisprudence and briefly see if there is an area of legal study that falls within Llewellyn's description of the quest for "real rules" and the study of "working rules" and is not considered part of sociological jurisprudence. Without becoming too involved in a discussion of sociological jurisprudence, let

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135. *Id.* at 175. See also Kelsen, *WHAT IS JUSTICE?*, 270 (1957), Kantorowicz, *Some Rationalism About Realism*, 43 *YALE L.J.* 1240, 1246 (1934).

136. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1355, 1379 n.5 (1940) (emphasis in original). See also *Id.* at 1363. See also Friedrich, *Remarks on Llewellyn's View of Law, Official Behavior, and Political Science*, 50 *POL. SCI. Q.* 419, 420-25 (1935).

us suggest that sociological jurisprudence is concerned with the effects of law on society. There is little to be gained by attempting to discover the connection between sociological jurisprudence and realism, or whether realism is a "violent reaction" to sociological jurisprudence<sup>137</sup> or is "in no way antithetical" to sociological jurisprudence.<sup>138</sup> We can adopt Pound's exposition of the scope of sociological jurisprudence and briefly mention the realists' contributions to areas considered within the sociological-jurisprudential platform as outlined by Pound. Pound suggests that sociological jurisprudence is primarily concerned with four studies: (1) study of the actual social effects of legal institutions and doctrines; (2) sociological study in preparation for legislation; (3) study of the means of making legal rules effective; and (4) recognition of the importance of reasonable and just solutions of individual causes.<sup>139</sup> The realists have repeatedly emphasized the importance of just solutions in individual cases. As far as the study of making legal rules effective in the society is concerned, probably the most ambitious study of this problem is Underhill Moore's study of the effect of parking laws in New Haven.<sup>140</sup>

The study of the actual effects of legal rules is a part of the realistic platform as well as an area encompassed by sociological jurisprudence.<sup>141</sup> We need not include a discussion of the realists' studies of the actual effects of legal rules within the society, though there have been several of these studies.<sup>142</sup> We can accept Pound's statement of the area of agreement between the two schools:

So far as they think of law (in all of its senses) functionally, so far as they urge study of the actual social effects of legal institutions, legal precepts, and legal doctrines, so far as they advocate sociological study in preparation for lawmaking, whether legislative or judicial, so far as they call for psychological study of the judicial and juristic processes, so far as they demand study of the social background and social effects of legal institutions, legal precepts, and legal doctrines and argue for recognition of the

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137. GURVITCH, *SOCIOLOGY OF LAW* 171-72 (1947).

138. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 9 (1937).

139. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 146 (1911); 25 HARV. L. REV. 146 (1911); 25 HARV. L. REV. 489 (1912).

140. MOORE & CALLAHAN, *LAW AND LEARNING THEORY: A STUDY IN LEGAL CONTROL* (1943).

141. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1237 (1931). See also Cook, *Legal Logic*, 31 COLUM. L. REV. 108, 109 n.31 (1931), Yntema, *The Purview of Research in the Administration of Justice*, 16 IOWA L. REV. 337 (1931).

142. For a discussion of these, see BEUTEL, *SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF THE SOCIAL SCIENCES* 108 (1957) and Patterson, *Some Reflections on Sociological Jurisprudence*, 44 VA. L. REV. 395, 401-02 (1958).

importance of individualized applications and of just solutions of individual cases — in all these respects they were anticipated by the sociological jurists of a generation ago.<sup>143</sup>

It is probably fair to conclude that the realists have in fact studied what the sociological jurists for many years have claimed needed studying, but this is of no importance today. Whether these areas of agreement be called realistic or sociological jurisprudence is not of much significance.

There is one aspect of realism, however, that is part of Llewellyn's "real rules" and his "working rules" projects and is not included in Pound's statement above, nor is it generally considered to be part of sociological jurisprudence. This may be an area that American legal realism can claim to itself and in which it can make a significant contribution to jurisprudence. We can accept the secondary rules of the legal system in order to discover the primary rules. We can then examine judicial decisions in order to determine if these decisions are instances in which the judges have applied the primary rules so that these decisions involve no change in the phrasing of the primary rules (this falls within the "working rule" project). If the case in question is not an instance of an application of a primary rule, we can attempt to discover the motivations involved in modifying or changing this rule of the pre-existing law, namely by an inquiry into the situations where justice or wisdom has prevailed. In areas where the law allows judicial discretion, the emphasis can be on a study of the social-scientific type, such as examining the actual sentencing of criminals within the statutory discretionary limits. In other words, an inquiry into the operation of the legal rules in the judicial process can be conducted, starting with the statement of these rules (the pre-existing law), and examining not the changes in the rules after the decision which may be considered to be more properly the area of the analytical study of the law, but reflecting on the actual judicial use of these rules and the circumstances in which the rules are changed or are not changed.

This, then, could be an area for study by the realistic jurisprudence of the future.

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143. Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 777, 791 (1938).